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Case No. _____

IN THE

# Supreme Court of the United States

October Term, 1995

STATE OF FLORIDA,

*Petitioner*,

vs.

CARLOS MIRAGAYA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT AND APPENDIX

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## QUESTION PRESENTED FOR REVIEW

WHETHER THE LOWER COURT'S HOLDING THAT THE RENTAL OF A VIDEOTAPE BY AN UNDERCOVER LAW ENFORCEMENT OFFICER FROM A VIDEOTAPE RENTAL BUSINESS AND THE COPYING OF SUCH TAPE FOR USE IN A CRIMINAL PROSECUTION CONSTITUTES A SEARCH OR A SEIZURE WITHIN THE MEANING OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IS IN CONFLICT WITH THIS COURT'S HOLDING IN *MARYLAND V. MACON*, 472 U.S. 463, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985).

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*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT

## OPINIONS BELOW

The opinion of the Florida Second District Court of Appeal in *Miragaya v. State* is reported at 654 So. 2d 262 (Fla. 2d DCA 1995). It is reproduced in the appendix at A - 1, et seq.

## JURISDICTION OF THE COURT

**On April 28, 1995, the Florida Second District Court of Appeal granted a petition for writ of certiorari filed by a criminal defendant, charged in state court with several misdemeanor counts of distribution of obscene material and possession of obscene material with intent to distribute, who had sought suppression of the evidence against him on the ground that it had been illegally seized in contravention of the Fourth Amendment to the Constitution of the United States. Discretionary review by the Supreme Court of Florida was timely sought, but was denied on June 23, 1995. This Petition for Writ of Certiorari was filed within ninety (90) days of the latter date. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1651.**

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

### 1ST AMENDMENT to the CONSTITUTION OF THE UNITED STATES

**Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.**

### 4TH AMENDMENT to the CONSTITUTION OF THE UNITED STATES

**The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.**

### SECTION 4 of the FLORIDA CONSTITUTION

**Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.**

## SECTION 12 of the FLORIDA CONSTITUTION

**The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.**

## 17 U.S.C. § 106

**Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:**

**(1) to reproduce the copyrighted work in copies or phonorecords;**

**(2) to prepare derivative works based upon the copyrighted work;**

**(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;**

**(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and**

**(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or**

sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

## 17 U.S.C. § 107

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

**SECTION 847.011(1)(a), Florida Statutes (1991)**

Any person who knowingly sells, lends, gives away, distributes, transmits, shows, or transmutes, or offers to sell, lend, give away, distribute, transmit, show, or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in any manner knowingly hires, employs, uses, or permits any person knowingly to do or assist in doing any act or thing mentioned above, is guilty of a misdemeanor of the first degree, punishable as provided in Sec. 775.082 or Sec. 775.083. A person who, after having been convicted of a violation of this subsection, thereafter violates any of its provisions, is guilty of a felony of the third degree, punishable as provided in Sec. 775.082, Sec. 775.083, or Sec. 775.084.

**SECTION 847.011(7), Florida Statutes (1991)**

**There shall be no right of property in any of the materials, matters, articles, or things possessed or otherwise dealt with in violation of this section; and, upon the seizure of any such material, matter, article, or thing by any authorized law enforcement officer, the same shall be held by the arresting agency. When the same is no longer required as evidence, the prosecuting officer or any claimant may move the court in writing for the disposition of the same and, after notice and hearing, the court, if it finds the same to have been possessed or otherwise dealt with in violation of this section, shall order the sheriff to destroy the same in the presence of the clerk; otherwise, the court shall order the same returned to the claimant if he shows that he is entitled to possession. If destruction is ordered, the sheriff and clerk shall file a certificate of compliance.**

## STATEMENT OF THE CASE

The instant case arose in county court, where Respondent was charged with six (6) misdemeanor counts of distribution (three (3) counts) and possession with intent to distribute (three (3) counts) of obscene material, in violation of Section 847.011(1)(a), Florida Statutes (1991). He filed a motion to suppress the physical evidence against him, to wit: the three videotapes alleged to be the obscene material in question, arguing that the warrantless "seizure" by law enforcement when undercover deputies copied his videotapes was in violation of "the First and Fourth Amendments to the United States and Florida Constitutions" (R 74). The State's position was that no search and no seizure had occurred in this case.

The facts underlying Respondent's motion to suppress were that two undercover sheriff's deputies went to C & M Home Video, a store owned by Respondent, and rented three videotapes. They returned the tapes to Respondent's store before the end of the agreed 24-hour rental period, but, before doing so, they made two copies of each of the three videotapes, giving one copy of each to the State Attorney's Office and the other to the Sheriff's Office evidence custodian (T 9). The evidence that the only purpose in copying Respondent's tapes was for use in a trial or evidentiary proceeding relating to criminal charges against Respondent for renting out obscene material and that no other use of the videotape copies was made (T 5, 12) was uncontroverted. After review of the videotape copies by an Assistant State Attorney, criminal charges were filed against Respondent.

Although no evidence to this effect was adduced, defense counsel stated in his argument to the trial court that, after the charges had been filed, Respondent had removed the videotapes in issue from his shelves "for fear of further prosecution if he continued to rent the material" (T 24). The prosecutor responded that Respondent's removal of the allegedly obscene videotapes from rental availability was his choice, that no attempt had been made by law enforcement

or by the State Attorney's office to restrain Respondent from disseminating the videotapes in question prior to a judicial determination as to whether or not they were obscene (T 33).

No evidence of the extent of Respondent's rights under federal copyright law was presented to the trial court.

The trial court granted Respondent's motion to suppress because "it is clear that the Supreme Court of the United States has consistently held that rigorous procedural safeguards must be employed before expressive materials can be seized as obscene," and, in the trial court's view a seizure had occurred here without implementation of the required safeguards. The trial court found this Court's opinion in *Maryland v. Macon*, 472 U.S. 463, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985), to be factually distinguishable because the defendant in *Macon* had sold all of his rights in the materials in question, whereas Respondent here retained a possessory interest in his videotapes and a "reasonable expectation of privacy...that that material would be returned to him."

The State appealed to the circuit court, which held that there had been neither an illegal search nor an illegal seizure in this case and therefore reversed, relying primarily on *Macon* and on the Florida Supreme Court's holding in *Stall v. State*, 570 So. 2d 257 (Fla. 1990), *cert. denied sub nom., Long v. Florida*, 501 U.S. 1250, 111 S. Ct. 2888, 115 L. Ed. 2d 1054 (1991), that the right to privacy under the Florida Constitution does not apply to vendors of obscene materials.

Respondent then filed a petition for writ of common law certiorari with the Second District Court of Appeal. In that petition, Respondent posed two issues: (1) whether owners of video rental businesses have a reasonable expectation of privacy in the material that they rent out, and (2) whether law enforcement officers can seize allegedly obscene material from a commercial business without a warrant or a judicial determination that the material is, in fact, obscene. Petitioner's response relied primarily on *Macon* and *Stall* for its negative response to the first issue posed by Respondent. As to the second issue, Petitioner denied that either a search or

**a seizure had occurred at all under the undisputed facts in this case, relying primarily on *Macon* and federal copyright law, including the fair use doctrine.**

**The Second District Court of Appeal's opinion ignored the *Macon* case, relied on two of this Court's cases in which the fact of the seizure of the materials in question was undisputed, and concluded that a seizure had occurred here in violation of the First and Fourth Amendments to the United States Constitution. The Second District did not address Respondent's first issue.**

## REASONS FOR GRANTING THE WRIT

### THIS COURT'S OPINION IN *MARYLAND V. MACON*, 472 U.S. 463, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985), COUPLED WITH THE CASE LAW ON FAIR USE OF COPYRIGHTED MATERIAL, CLEARLY ESTABLISHES THAT NEITHER A SEARCH NOR A SEIZURE OCCURRED HERE WITHIN THE MEANING OF THE FIRST AND FOURTH AMENDMENTS.

*Maryland v. Macon*, 472 U.S. 463, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985), held that entry into a business and examination of materials offered for sale does not constitute a search and that the purchase of one or more of the items offered for sale does not constitute a seizure within the meaning of the Fourth Amendment to the Constitution of the United States.[1]

---

[1]It is clear that the decision of the Second District Court of Appeal was based solely on its interpretation of search and seizure law under the Fourth Amendment to the United States Constitution. Furthermore, the Second District's decision could not conceivably be grounded on state law inasmuch as the provision of the Florida Constitution proscribing unreasonable searches and seizures is Article I, Section 12, which provides in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures,...shall not be violated....*This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.*" (Emphasis supplied.) The Florida Supreme Court has interpreted this provision to mean that the state courts of Florida are "bound to follow the United States Supreme Court's interpretations of the Fourth Amendment and to provide no greater protection than those interpretations." *Perez v. State*, 620 So. 2d 1256, 1258 (Fla. 1993).

Petitioner agrees that, under *Maryland v. Macon*, a "seizure occurs when 'there is some meaningful interference with an individual's possessory interests' in the property seized." 472 U.S. at 469, 86 L. Ed. 2d at 470. Petitioner further recognizes that the Fourth Amendment guarantee against unreasonable seizures protects property interests even in the absence of a privacy interest. *E.g., Soldal v. Cook County*, 506 U.S. ___, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992). However, there was no meaningful interference with Respondent's property interests here.

It is undisputed that the undercover officers here returned the tapes they rented within 24 hours, in accordance with the rental agreement. Accordingly, Respondent was no more deprived of his possessory interests in the "original" tapes that he rented out than was the bookstore owner in *Maryland v. Macon*.

It must also be made clear that there was no prior restraint here. The videotapes rented from Respondent were returned within the contractually agreed-upon period, and there is no evidence that Respondent's removal of the tapes in question from his shelves was anything but a voluntary decision on his part. There is no evidence that he was told by any judge or law enforcement officer not to rent these tapes out prior to the making of a determination as to whether or not they were obscene after a trial or adversary hearing and no evidence that he was threatened by any judge, law enforcement officer, or State Attorney's Office employee or staff member with additional criminal charges if he rented out any of the videotapes in issue prior to a proper judicial determination as to whether or not they were obscene.

Thus, the only property right that could possibly have been violated here would be any right that Respondent might have under federal copyright law, specifically, 17 U.S.C. § 106. However, no evidence of the extent of Respondent's rights under the copyright law was presented to the trial court. Presumably Respondent was not the creator of

any of the videos; therefore, he has failed to demonstrate that he has standing to raise any copyright infringement claim. *See Sony Corp. v. Universal City Studios*, 464 U.S. 417, 434, 104 S. Ct. 774, 78 L. Ed. 2d 574, 587 (1984).

However, assuming arguendo that Respondent did have any rights that would be protected under copyright law that could render the copying of a rented videotape by one of his patrons unauthorized and actionable, those rights are limited by the "fair use" doctrine, codified in 17 U.S.C. § 107, which provides in pertinent part:

> [T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work....

The enumerated factors are not, however, intended to be exhaustive or exclusive. *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 560-561, 105 S. Ct. 2218, 85 L. Ed. 2d 588, 607 (1985).

A federal court has held in at least two cases, *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir.), *cert. denied*, 459 U.S. 826, 879, 103 S. Ct. 58, 59, 175, 74 L. Ed. 2d 62, 143 (1982), and *Religious Technology Center v. Wollersheim*, 971 F.2d

364 (9th Cir. 1992), that copying copyrighted material solely for use in litigation constitutes fair use, and the latter opinion quotes as follows from 3 NIMMER ON COPYRIGHT § 13.05[D] at 13-91 (1991): "[W]orks are customarily reproduced in various types of judicial proceedings, including obscenity and defamation actions...and it seems inconceivable that any court would hold such reproduction to constitute [copyright] infringement either by the government or by the individual parties responsible for offering the work in evidence." 971 F. 2d at 367. Since the uncontroverted testimony before the trial court was that the copies made in the instant case were made solely for use in the instant litigation and there was no evidence that they were actually used for any other purpose by anyone, the making of these copies was therefore fair use.

The same conclusion can be reached by considering all of the factors set forth in 17 U.S.C. § 107. As to the first factor, the use was for a nonprofit purpose, the preservation of evidence in a criminal investigation, and not for commercial exploitation. This use could also be considered a species of time shifting, which, in itself, was recognized as a fair use by the United States Supreme Court in *Sony*. The case law makes it clear that, despite the language of the statute, a nonprofit purpose need not be educational. *Sony; Jartech; Wollersheim*.

As to the second factor, the nature of the copyrighted work here (assuming arguendo that it was, in fact, copyrighted) is more creative than informational. The creative nature of the material means that the scope of fair use in this case is less than the scope of fair use for informational works, but this conclusion is not determinative of the ultimate question of whether law enforcement infringed on Respondent's property rights here. *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986).

As to the third factor, the amount and substantiality of the portion of the materials in issue that were copied, the videotapes here were copied in their entirety. However, this

fact is not determinative either. In determining whether a film or other creative work is obscene, the trier of fact must consider, inter alia, "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419, 431 (1973) (emphasis supplied). Accordingly, given the purpose of the copying involved here, it was absolutely necessary that the videotapes be copied in their entirety. Furthermore, it has been held that even the copying of an entire work can be fair use, *Sony*, even where a profit motive is involved, *Hustler*.

Finally, as to the fourth factor, the effect of the use on the potential market for or the value of the work, which has been held to be "undoubtedly the single most important element of fair use," *Harper & Row*, 471 U.S. at 566, 85 L. Ed. 2d at 611 (1985), because the distribution and use of the copies here was limited to distribution to the State Attorney's Office and, potentially, a showing of the copies to a judge and perhaps also to a jury for a determination of whether the videotapes in question were obscene, any diminution in the market for these works by virtue of their being viewed for free by people who might otherwise have rented a copy of one or more of them from Respondent is minimal in terms of the number of potential lost customers alone. *See Sony; Hustler*. Moreover, State Attorney's Office staff, judges, and jurors in a criminal obscenity case would probably not be counted among Respondent's patrons. *See Hustler*, 796 F. 2d at 1156.

Of course, Respondent could logically argue that, in the event of a determination that any of the videotapes in question was obscene, the marketability of that tape or tapes would be completely eliminated. However, at that point, Respondent would have no property interest whatsoever in the tapes. Under Section 847.011(7), Florida Statutes (1991), there is no property right in obscene materials. Obscene materials are not protected by the First Amendment, and distribution of them, once they have been judicially determined to be obscene following a trial or adversary hear-

ing, may be enjoined, *Miller v. California; Ladoga Canning Corp. v. McKenzie*, 370 So. 2d 1137 (Fla. 1979). Materials that have been properly determined to be obscene may also be destroyed. § 847.011(7); *Carlisle v. State ex rel Smith*, 319 So. 2d 624 (Fla. 4th DCA 1975). Inasmuch as Respondent has been neither prevented from renting out any of his copies of the tapes in question nor unlawfully coerced by illegal court order or threat from law enforcement or any other governmental authority into refraining from renting them out prior to a proper judicial determination as to whether or not they are obscene, the copying of the tapes in issue by the undercover officers here has, to date, not affected the marketability of the tapes owned by Respondent, and Respondent has no cognizable property interest in them once they are determined to be obscene after a trial or adversary hearing, should such a determination ultimately be made.

The bottom line is that there was no seizure here: The undercover officers had a right to rent the videotapes in question and further had a right under the fair use doctrine to copy those tapes for use as evidence in litigation against Respondent. What they did did not constitute a restraint upon Respondent prior to an adversary determination of whether or not the videotapes in question constituted obscene material. There was no violation of Respondent's rights under either the First or the Fourth Amendment. The circuit court below therefore correctly reversed the trial court's finding of an illegal seizure and consequent suppression of the tapes, and the Second District Court of Appeal failed to correctly apply controlling United States Supreme Court precedent. The resulting conflict with *Maryland v. Macon* is intolerable, and this Honorable Court should grant the instant petition for writ of certiorari in order to resolve this conflict.

## CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Petitioner respectfully requests that this Court grant the petition for writ of certiorari and reverse the decision of the Florida Second District Court of Appeal.

Respectfully submitted,

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*Respondent*.

## PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT

## APPENDIX

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

CARLOS MIRAGAYA,

Petitioner,

v. CASE NO. 94-03020

STATE OF FLORIDA,

Respondent.

Opinion filed April 28, 1995.

Petition for Writ of Certiorari to the Circuit Court for the Twentieth Judicial Circuit for Collier County; sitting in its appellate capacity.

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Berry & Day P.A.,
Naples, for Petitioner.

Robert A. Butterworth,
Attorney General, Tallahassee,
and Susan D. Dunlevy,
Assistant Attorney General,
Tampa, for Respondent.

RYDER, Acting Chief Judge.

Carlos Miragaya seeks review of a decision of the circuit court, acting in its appellate capacity, reversing a county

court order which granted a motion to suppress three video tapes allegedly illegally seized by the Collier County Sheriff's Department. We grant the petition and issue the writ.

After obtaining a card from Miragaya's store authorizing the rental of video tapes for a twenty-four hour period, two undercover officers entered a back room and randomly selected three video tapes. The officers viewed the three tapes at the Sheriff's Department and made copies. The officers did not make an independent determination that the tapes were obscene, but copied them to preserve evidence to be presented to the state attorney for possible charges. The officers returned the tapes to the store within the twenty-four hour rental period. Subsequently, Miragaya was charged with "Possession of Obscene Motion Film" and "Possession with Intent to Sale/Deliver [sic] an Obscene Motion Film," in violation of section 847.011(1)(a), Florida Statutes (1991).

In his motion to suppress, Miragaya asserted that by copying the video tapes the officers significantly interfered with his possessory rights in the tapes, the warrantless seizure of the tapes violated his rights under the Fourth Amendment to the Constitution of the United States, and the seizure of the tapes prior to a judicial determination that they are obscene results in significant prior restraint to his rights under the First Amendment to the Constitution of the United States. The county court agreed and entered an order granting the motion to suppress the "illegally seized" video tapes.

The circuit court, acting in its appellate capacity, reversed the county court's order and remanded, finding that the county court failed to consider Stall v. State, 570 So. 2d 257 (Fla. 1990), cert. denied, 501 U.S. 1250, 111 S. Ct. 2888, 115 L. Ed. 2d 1054 (1991). According to the circuit court, the Stall case is dispositive as it stands for the proposition that there is no right to privacy under the Florida Constitution for a commercial vendor of obscene materials. Id. at 259.

In an opinion on motion for clarification, the circuit court held that in the present case, there had been neither an illegal search, nor an illegal seizure, and thus no violation of the Fourth Amendment or the Florida Constitution. Reasoning that there had been no interference with the owner's possessory interest because the tapes had been timely returned, the court found that the owner "had voluntarily transferred to the deputy, as part of a commercial transaction, any possessory interest he may have had in the content of the tapes."

We disagree. To this court's knowledge, as of the date of this opinion, the video tapes which are at the center of this controversy have never been examined by a neutral magistrate to determine if they are obscene. It appears that the sheriff is attempting to circumvent the requirement that there be an obscenity determination by a judicial officer of any item which is subject to First Amendment protection prior to its seizure. See Roaden v. Kentucky, 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973).

We hold that the officer's act of copying the rented video tapes constitutes a seizure of Miragaya's property. While it is true that law enforcement officers are allowed to keep a single copy of a video tape or movie for purposes of preserving the evidence; see Johnson v. State, 605 So. 2d 545, 548 (Fla. 2d DCA 1992), the lawful retention is dependent upon the issuance of a warrant for the seizure of the item prior to the officers obtaining it. Only when a warrant has been issued is the retention not a prior restraint. See New York v. P.J. Video, Inc., 475 U.S. 868, 873-74, 106 S. Ct. 1610, 89 L. Ed. 2d 871 (1986); Heller v. New York, 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973).

The copying of the movie onto a blank cassette for the purpose of pursuing a prosecution for distribution of obscene materials without the determination that the movie is obscene is an illegal seizure even when the original cassette is returned to the store owner during the rental period. It is inconsequential whether the cassette which contains the movie belongs to the store owner, or whether the

**law enforcement officers have purchased a blank cassette onto which the movie has been copied: the item that the store possesses is the thing that is copied onto the tape: the movie.**

**The circuit court has violated a clearly established principle of law by approving the seizure of items which are subject to First Amendment protection without the prior determination by a neutral magistrate that such items are obscene. Accordingly, we grant the petition, issue the writ, quash the circuit court opinion, and approve the county court's order suppressing the video tapes.**

DANAHY and LAZZARA, JJ., Concur.

# Supreme Court of Florida

FRIDAY, JUNE 23, 1995

| | | |
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| STATE OF FLORIDA, | * | |
| | * | |
| Petitioner, | * | CASE NO. 85,662 |
| | * | |
| v. | * | DISTRICT COURT OF APPEAL, |
| | * | 2ND DISTRICT NO. 94-03020 |
| CARLOS MIRAGAYA, | * | |
| | * | |
| Respondent. | * | |
| | * | |
| | * | |

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, SHAW, KOGAN, HARDING and WELLS, JJ., concur

A True Copy

TEST

Sid J. White
Clerk, Supreme Court

BH

cc: Hon. William A. Haddad, Clerk
Hon. Dwight E. Brock, Clerk
w/copy to Circuit Judge

Ms. Susan D. Dunlevy
Mr. Robert J. Krauss
Mr. Donald P. Day